SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 384

PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, THE NEW YORK TIMES COMPANY),

Petitioner,

v.

NEW YORK MAILERS' UNION NUMBER SIX,

Respondent.

BRIEF IN OPPOSITION TO RESPONDENT'S SUGGESTION OF MOOTNESS

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In the

Supreme Court of the United States

October Term, 1963

No. 384

Publishers' Association of New York City (on behalf of its member, The New York Times Company),

Petitioner,

v.

New York Mailers' Union Number Six,

Respondent.

BRIEF IN OPPOSITION TO RESPONDENT'S SUGGESTION OF MOOTNESS

Introduction

Contrary to the assertions in Respondent's Suggestion of Mootness (p. 2), petitioner has not obtained, by virtue of the "materials" printed in the Appendix thereto, the full relief which it sought in this Court and in the action brought in the district court. Respondent has posed a narrow and incomplete description of the relief sought by petitioner in order to make the contention that its belated and unilateral action has made the issue moot.

Petitioner is not seeking only to prevent the Union from actually disciplining foreman Rowan on this particular charge. Petitioner wants a judicial declaration that, contrary to what the Second Circuit held, the status quo and no-discipline clauses of this labor contract are not made dead letters by Norris-LaGuardia; that the clauses have

meaning, and that in this situation, they mean that the Union cannot hold or threaten any disciplinary proceeding against foremen for acts done pursuant to management directives. In actual fact, the withdrawal does not grant petitioner any relief at all. Its only effect is to save Rowan from a penalty. The harm to petitioner's contractual right not to have its foremen disciplined by the union was done as soon as Rowan was threatened with disciplinary action. This harm is not undone by the union discontinuance. Therefore, this case is basically different from those cases* where a party seeking specified relief is conceded it on appeal.

In order to understand and appreciate petitioner's position with respect to respondent's latest maneuver, it is necessary to consider this case in its broader perspective. Petitioner and its members for some years have been plagued by harassment of their foremen through internal union disciplinary proceedings, particularly by the New York Typographical Union No. 6 (affiliated with respondent here in that both are subordinate locals of the International Typographical Union) and the unaffiliated Newspaper and Mail Deliverers' Union of New York and Vicinity. Under the contract with the Deliverers' Union, an Impartial Chairman with injunctive powers is constantly available to hear cases involving attempted union discipline of foremen and, as a result, resort to court has not been necessary with that union. On the other hand, under the

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* E.g., *Lewis Pub. Co.* v. *Wyman*, 228 U. S. 610 (1911) and *Taylor* v. *McElroy*, 360 U. S. 709 (1959). The latter, cited by respondent, actually supports petitioner's position. Taylor sought and, while the case was on appeal, gained "the ultimate relief which he demanded" (at 711), namely, his security clearance. This Court only declared the controversy moot after the Solicitor General had represented in open court that the evidence in the Government's files would not be used against Taylor again. (See *id.* at 711.) That removed the distinct, indeed dangerous, probability, present herein, that the incident would recur.

contracts with the Typographical and Mailers' Unions, arbitration is on an "ad hoc" basis and it frequently takes weeks or even months before an arbitrator can be selected and a grievance scheduled for hearing. In these circumstances, no arbitration remedy is available to prevent the unions from entertaining disciplinary proceedings against foremen, even though it is clear that the charges relate to the performance of management duties. The only recourse (where the employer is advised of the discipline*) was to seek to set aside the discipline by arbitration after the fact. While this course has some salutary effect on the morale of the foremen, the indignity of being subjected to such actions has a distinct demoralizing effect upon the foremen (See affidavit of C. Raymond Hulsart, R. 22-23).

In 1959, in a case involving discipline by the Typographical Union of an assistant foreman at the Long Island Daily Press, an arbitrator held the grievance of the publisher non-arbitrable because the General Laws of the ITU were involved and such laws, incorporated by reference in the contract, were not subject to arbitration. The Typographical Union thereafter took the position that its asserted right to discipline foremen under its laws was not subject to arbitration. However, during the pendency of the appeal to this Court from the order of the N. L. R. B. in *News Syndicate Co. Inc.*, 122 NLRB 818, rev'd 279 F. 2d 323, aff'd 365 U. S. 695 (1961) (wherein respondent argued that foremen were not subject to union discipline**), the actual visitation of discipline upon foremen by International Typographical Unions was substantially reduced.

However, in 1961, when the Typographical Union again entertained charges against a New York Times foreman,

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* Of course, not every foreman threatened or disciplined by the Union reports the fact to his employer.

** See Brief for Petitioner, p. 3, n. 1.

petitioner demanded arbitration and maintenance of the status quo. The union refused, contending the dispute was not arbitrable. Petitioner brought an action to compel arbitration including in its demand for relief a request for a stay of the union proceedings pending arbitration. That relief was granted by the district court (*Macneish* v. *N. Y. Typographical Union 6*, 205 F. Supp. 558 [S. D. N. Y. 1962]). Thus, the petitioner had achieved a judicially-sanctioned procedure and a remedy to protect foremen from union discipline pending the arbitration. It is to be emphasized that the stays granted by the district courts were based upon the contractual commitment of the parties to observe the status quo and the application of the usual equitable principles of irreparable injury, balancing of equities and absence of an adequate legal remedy.

This remedy was thereafter invoked successfully with regard to the attempted discipline of two other Typographical Union supervisors (*Publishers' Ass'n* v. *New York Typographical Union No. 6*, 62 Civ. 3024 [S. D. N. Y. 1962] [not officially reported]), and the Mailers' Union foreman in this case. The Typographical Union took appeals from the orders compelling arbitration and refused to proceed with the arbitrations pending the appeals. Those appeals have never been perfected and the arbitrations have not been held. However, that posture was acceptable to the publishers since the union was effectively restrained from proceeding with the discipline of the foremen. The Mailers' Union did perfect its appeal in this case and succeeded in vacating the stay on the basis of Norris-LaGuardia. Thus, the effective remedy procedure petitioner had only recently established was destroyed. Petitioner hopes to reestablish that practical protection of its foremen by a declaration from this Court.

In a case subsequent to the decision of the Court of Appeals in this case, petitioner moved to compel the Typo-

graphical Union to arbitrate its attempt to discipline a New York Journal-American foreman for his actions in securing machines on the night the 114-day strike was called by the Typographical Union. In view of the decision of the Court of Appeals, no request for a stay of the discipline was made. *Pock v. New York Typographical Union*, 225 F. Supp. 181 (S. D. N. Y. 1963). The disciplinary proceedings were concluded, the foreman was found guilty and fined and the Journal-American is relegated to the inadequate remedy of arbitration after the fact where the expected relief will be, at most, a declaration by the arbitrator that the Union should not have disciplined that foreman.

The effect of a determination of mootness in this case, even with a vacatur of the Court of Appeals judgment, would be to deny the publishers the opportunity to restore the practical remedy they only recently established for the protection of their foremen. The next time a union starts to discipline a foreman, an application by petitioner for a stay of proceedings will undoubtedly be denied by the District Court. The decision of the Court of Appeals in this case may be vacated but its reasoning will remain. It is axiomatic that no District Court in this Circuit will reach a result it knows its Court of Appeals is certain to overturn.

If a stay cannot be obtained in the first instance, the disciplining will proceed and be completed. A live issue could never be preserved for determination by higher courts. In sum, by withdrawing the charges against foreman Rowan at this late date, the Union may succeed in forever foreclosing petitioner from protecting its foremen from discipline. On the basis of the authorities cited below, we submit that this Court should not deprive petitioner of a hearing on the merits.

I

This case is not moot because there remains a continuing controversy between adverse parties over an existing subject matter.

Respondent asks this Court to conclude that its withdrawal of charges against Everett Rowan has made this action "moot". Therefore, it is not inappropriate to look at the classic definition of "mootness":

> "[A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." [*Ex parte Steele*, 162 Fed. 694, 701 (N. D. Ala. 1908); see also Black, *Law Dictionary* (4th ed. 1951), at 1159.]

Petitioner submits that, notwithstanding the Union's attempt to escape from this case, a real, viable controversy remains and that a judgment of this Court would have a practical legal effect, indeed a dispositive one, on this existing dispute.

The essence of the concept of mootness is that, as there no longer exist adverse parties and sufficient legal issues to maintain the litigation, any decree will be a futile exercise. See 6 Moore, *Federal Practice* ¶57.13, at 3074 (2d ed. 1953). Petitioner will demonstrate that there still remain before the bar of this Court adverse litigants against whom the Court may enforce its decision, cf. *Eisler* v. *U. S.*, 338 U. S. 189, 192 (1949) (dissenting opinion), and an actual sub-

sisting controversy, see *U. S. v. W. T. Grant Co.*, 345 U. S. 629, 632 (1953), which has not been settled by the Union's tactic and will not be settled without a decision from this Court. *See* Note, *Cases Moot on Appeal*, 103 U. Pa. L. Rev. 772, 783 (1955). Consequently, there is a subject matter in controversy between these parties "on which the judgment of the court can operate." *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37, 43 (1944).

In essence, the ruling of the Second Circuit was that Section 34 of the labor contract between these parties* is unenforceable due to Norris-LaGuardia. The Union does not now and never has retreated from its position that this is a correct statement of the law as applied to this litigation. (See para. 2, Answer, R. 25.) Petitioner has consistently asserted that the processing of charges against this or any other management representative, without more, is a violation of Section 20-*c* of this contract.** (See para. 14 of complaint, R. 9, and affidavit of C. Raymond Hulsart, at R. 21.) Respondent continues to dispute this position (Resp. Sugg., p. 4). It matters very little that the arbitra-

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* "Section 34. It is agreed that fruitless controversies must be avoided and every effort made to maintain harmonious relations. To accomplish this, both parties will in every instance give prompt attention to disputes and will in good faith endeavor to settle all differences by conciliation between the Chapel Chairman and the Foreman, or, if necessary, between the officials of the Union and the employer. In the event that a decision is not reached by conciliation then the difference may be referred to the Joint Standing Committee as herein provided. Pending decision (in all except discharge cases) conditions existing prior to the dispute shall be maintained. However, no condition which has existed for thirty (30) days prior to a complaint in writing shall be changed, pending the decision of the Joint Standing Committee." (R. 8).

** "Section 20-c. The Union shall not discipline the Foreman for carrying out the instructions of the Publisher or his representative" (R. 6).

tion can now "continue without any interference, real or imaginary" (Resp. Sugg., p. 4) now that the Union has discontinued what it had no right to begin. Surely, the arbitration may proceed to a conclusion but any determination that the Union did indeed violate this contract by entertaining charges against Rowan could not undo the harm already done. There is a very definite and acute controversy here.

II

Where there is a probability that the party causing the mootness will resume the challenged activities, the case still presents a justiciable issue.

This Court has repeatedly said that where there is a likelihood that the acts complained of will be repeated, the issues remain justiciable and it can proceed to render a judgment defining the rights and obligations of the parties. 6 Moore, *Federal Practice* ¶57.13, at 3075 (2d ed. 1953); *So. Pacific Terminal Co.* v. *ICC*, 219 U. S. 498 (1911) and *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). Petitioner need only show that the original factual situation is likely to be replaced on its expiration by another which is substantially identical and which will continue to affect the substantive rights of the parties in the same manner. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 146 (1946), or to use this Court's own formulation:

> "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

Respondent's consistent behavior both before and during this litigation certainly indicates that the factual situation will recur.*

This case is not an isolated incident. It is only one of many attempts this Union has made to intimidate management representatives by threatening or instituting disciplinary proceedings. The Union's own statistics show that in the decade from 1953-1962, forty-seven discipline cases concerning Mailers' foremen went to trial (R. 40). This total, the Union admits (R. 39), does not include the "more voluminous" charges or threats of charges that never reached the trial stage. Nor does it include the charges and threats of its big sister, Typographical Union No. 6. It is particularly revealing that, during this same period, foremen, who only constitute about 5% of the total Mailers' Union membership, were involved in 40.2% of these discipline trials. This disproportionate number of foremen discipline cases certainly bears witness to the existence of a calculated harassment campaign. These attempts continue to the present day. Since the Union has never promised to discontinue this harassment program, there is much more than a strong probability that they will continue until a court declares that Sections 20-c and 34 of this contract can be judicially enforced.

So. Pacific Terminal Co. v. *ICC*, 219 U. S. 498 (1911), is instructive. After certiorari was granted, defendant's objectional order expired as anticipated by defendant. This Court found that the defendant could, and in all likelihood

* Though many of the cases invoking this repetition exception to mootness involve governmental agencies, the exception is not limited to regulatory orders alone. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 136-138 (1945); see, e.g., *Securities & Exchange Comm.* v. *Okin*, 132 F. 2d 784 (2d Cir. 1943), and *Papaliolios* v. *Durning*, 175 F. 2d 73 (2d Cir. 1949).

would, re-issue the controverted order. Consequently, it ignored a suggestion of mootness because to do otherwise would allow defendant to prevent plaintiff from asserting potentially legitimate rights and ever gain adequate judicial redress. *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (4th Cir. 1943), involved a similar technique. The Fourth Circuit reached the same result because (at 105):

> "The admitted likelihood of Haile's resuming operations as soon as the ban . . . has been lifted clearly indicates that a genuine and substantial controversy exists between the parties. The possibility of future violations . . . is very much with us and not merely within the realm of prophecy."

The above applies with greater force to the instant case where the Union has decided it would be prudent to discontinue one attempt to browbeat one foreman and, at the same time, remain free to continue their general campaign of vexation.

The burden is on respondent to show that this case has become moot. As soon as petitioner demonstrates the danger that this wrong will be repeated, this "heavy burden" shifts to the Union. *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). They must disprove the existence of this danger. This is because "courts do not favor the powerful weapon of mootness" (*Id.*, at 633).

In this case, the pattern of repeated contract violations that have continued to the present shows either that the Union does not regard the status quo or no-discipline clauses as binding or, in the alternative, will deliberately and consistently violate them until stopped. The Union's conduct prior to as well as during this litigation does not inspire confidence in its treatment of petitioner's rights free from the sanction of a definitive judicial declaration

of rights and liabilities. Despite the clear language of Section 20-c, this Union has never conceded that they had no right to discipline or consider disciplinary charges against management representatives.*

Now that this case is about to be heard on the merits, respondent files a Suggestion of Mootness based upon two pieces of paper that are more significant for what they omit. Kelly, in a communication to his union president, withdfaws the charge he made concerning incidents in August, 1962 and says he will not make another charge in connection with those incidents. He does *not* say that he will not again file charges the next time foreman Rowan gives him an order or criticizes his work. President Laura, in his affidavit, states that he has dissolved the proceedings initiated by Kelly. He does *not* say that the Union will henceforth honor its contractual obligation not to discipline foremen, or that he will not take cognizance of charges against foremen arising out of the performance of their management duties, or that he will honor the demand of the petitioner that the status quo be observed in future foreman discipline cases. In fact, the dismissal with prejudice of the charges against Rowan does not even create an obligation running to and enforcible by this petitioner. Subsequent court action would be necessary and, just as here, that would only serve to close the barn door after the horse had escaped.

What the Union has in effect done is to cease activity it had no right to commence in the first instance. It merely abandoned prohibited activity after it had accomplished its objective. In short, the Union is attempting to escape a sinking ship in dread of losing this case on the merits. Cf. *U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417, 445 (1920).

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* The Union has always contended they have this right since the foremen are union members. See letter of Union president, Laura, R. 17-18 and his affidavit R. 43.

The discontinuance of illegal conduct under the threat of litigation does not make a case moot. See, e.g., *U. S. v. W. T. Grant Co., supra*, at 632 (1953). Justice Murphy, speaking for the Court in *Walling* v. *Helmerich & Payne*, 323 U. S. 37 (1944), summarized this exception to the mootness doctrine as follows (at 43):

> "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. . . . Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus 'an actual controversy, and adverse interests,' . . . with a 'subject-matter on which the judgment of the court can operate'."

Otherwise, every defendant guilty of illegal or prohibited conduct could avoid complete judicial review by exactly the same escapist technique employed by this Union.

III

Where there is the danger that the defendant will resume prohibited conduct, the fact that the alleged mootness was caused solely by the action of defendant requires a finding of justiciability.

Mootness is a conclusionary word typifying a general judicial attitude. Judge Prettyman has recently clearly delineated this basic principle. In *Labor Youth League* v. *Subversive Activities Control Bd.*, 322 F. 2d 364 (D. C. Cir. 1963), he said (at 374):

> "mootness is not a fixed term of uniform factual content but is a variable from the factual standpoint, that it arises from different causes, and that the action

> required by justice varies from case to case depending on the circumstances."

This case does not have the classic elements of mootness. There are before the Court adverse parties, having definite legal interests in this outcome, who will present complete arguments (See Note, 103 U. Pa. L. Rev. 772, 796 (1955)). There is nothing fictional or collusive about this case. See *Gelpi* v. *Tugwell*, 123 F. 2d 377, 379 (1st Cir. 1941) (dissenting opinion).

If this case is moot, it is only because respondent alone has decided it should be. This alleged mootness occurred through no fault of petitioner. It is not surprising that this and other courts have refused to allow litigants to exert such unilateral control over the judicial process. See *Murphy* v. *Benson*, 270 F. 2d 419, 421 (2d Cir. 1959) cert. denied 362 U. S. 929 (1960) and *U. S.* v. *Oregon State Medical Soc.*, 343 U. S. 326, 333 (1952).

Respondent's Suggestion significantly omits *Mills* v. *Green*, 159 U. S. 651 (1895), the leading case on the subject of mootness. This omission becomes meaningful when one examines *Mills* closely. The Court said there (at 654) that a court would be deprived of jurisdiction if, due to "plaintiff's own act or [a] power beyond [the] control of either party", an event occurred which made any relief impossible. In *Mills*, the defendant argued mootness. The Court upheld his argument because the event causing the mootness had been brought on "without the fault of defendant" (*Id.*, at 654). In short, *Mills* suggests that a defendant cannot claim mootness where any want of an actual controversy is caused solely by his own acts. This Court has endorsed this sound rule since that time. See, e.g., *U. S.* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466, 477 (1916), and *So. Pacific Terminal Co.*, *supra*, at 514.

IV

The inevitability that labor contracts, projects and proceedings of limited duration will be completed before appellate consideration is possible makes their factual mootness an inappropriate consideration.

Many problems, by their nature, have no present factual foundation by the time they reach upper judicial levels. Such cases frequently involve construction projects. Inevitably, the projects are completed long before the dispute progresses very far up the judicial ladder. However, this does not deter the courts from defining the rights and obligations of the parties. See *Mitchell v. S. W. Engineering Co.*, 271 F. 2d 427 (8th Cir. 1959), and *Goldberg* v. *Wade Lahar Constr. Co.*, 290 F. 2d 408 (8th Cir.) cert. denied 368 U. S. 902 (1961). These courts emphasized that the offending party continued in the construction business and proceeded to decide the case even though the particular project out of which the dispute arose had been completed.

It is in the nature of disciplinary proceedings that the actual dispute will, in all probability, be concluded before appellate review. This will occur if the disciplinary proceedings are prosecuted to a conclusion. That would certainly have taken place here if these proceedings had followed their normal course since almost two years have elapsed since they began. This can also happen if the parties agree to arbitrate and the arbitration is concluded before the case reaches an appellate court. In fact, the instant case is very unusual in that the proceedings have remained viable for such a long time. This has occurred only because (1) the Union refused to arbitrate until after the Second Circuit opinion, and (2) the Union agreed at the time of the Second Circuit opinion to withhold further action until after this Court's determination.

The same situation was before this Court in *Teamsters* v. *Yellow Transit*, 370 U. S. 711 (1962). The District Court had issued an injunction against picketing. This injunction was to expire when the labor contract expired. As could be expected, the labor contract, and, therefore, the injunction, expired a few weeks after this Court granted certiorari. As here, respondent there suggested mootness (see Brief for Respondent, pp. 31-33, also App. B) about a month after petitioner had filed its main brief. The controversy was, as here, over the availability, despite Norris-LaGuardia, of a labor injunction. Therefore, *Yellow Transit* presented exactly this situation. In fact, *Yellow Transit* presented a stronger case for the application of the mootness doctrine of *Mills* v. *Green* since the injunction had expired by its own terms and not by the act of any party. Nevertheless, this Court did not adopt respondent's suggestion of mootness. Instead, it reversed the Tenth Circuit on the merits.

It is rare that such fact situations are preserved for judicial scrutiny. The recent case of *Motor Coach Employees* v. *Greyhound Lines*, —— F. Supp. ——, 55 L. R. R. M. 2078 (D. C. D. C. December 18, 1963), indicates this inherent problem. Greyhound announced on October 31, 1963 that they would move their Washington maintenance department to Chicago as of January 6, 1964. The union requested arbitration but the case could not be heard before the proposed moving date. The union sought a preliminary injunction restraining the company from moving pending the completion of arbitration. In an opinion using many of the arguments petitioner used in its main brief in this case, Judge Holtzoff held Norris-LaGuardia inapplicable and granted the injunction. If Judge Holtzoff had not been a perceptive reader of *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957) and had denied the injunction, the move would have taken place and the issue

would have become technically moot long before it reached any appellate court. Similarly, even with the injunction, the arbitration will, in all probability, be concluded before any appellate court could hear Greyhound's appeal. The lesson of *Greyhound* and *Yellow Transit* is that potential mootness is inherent in situations like the present. If respondent's contention is upheld, judicial review will be effectively denied to all problems in this area.

V

If this question is moot, the precedents of this court leave no doubt that both judgments below must be vacated and costs assessed against respondent.

Respondent devotes some space to the remedy applicable if this Court should adopt its suggestion of mootness. We will not discuss at length respondent's observation (Resp. Sugg., p. 5) that a vacation of both lower court judgments produces the "same result" as vacating the grant of certiorari and leaving the Second Circuit opinion standing. This does not merit extended discussion.*

The shortest answer to respondent is found in this Court's own language in *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950):

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our

* The accepted disposition of mooted cases is meant to wipe out the *res judicata* effect of the judgment below. See *Henriques* v. *Gulf Oil Corp.*, 305 F. 2d 51 (10th Cir. 1962) and *Colpo* v. *Highway Truck Drivers*, 305 F. 2d 362 (3d Cir.) cert. denied 371 U. S. 890 (1962). Respondent's second alternative would be the same disposition of the case but a radically different disposition of the issues.

decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

Accord: Stern & Gressman, *Supreme Court Practice*, 438 (3rd ed. 1962), and Robertson and Kirkham, *Jurisdiction of the Supreme Court* ¶273 at 498-500 (Wolfson and Kurland's ed. 1951).

Finally, it is settled that where one party causes the mootness, that party must pay costs. *Heitmuller* v. *Stokes*, 256 U. S. 359 (1921). See Note, 103 U. Pa. L. Rev. 772, 794-95 (1955).

CONCLUSION

Petitioner asks that this Court reject respondent's suggestion of mootness and dispose of this case on the merits as it did with *Teamsters* v. *Yellow Transit*, 370 U. S. 711 (1962).

Respectfully submitted,

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Dated: February 18, 1964.